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Constitutional Law: Mere Membership in a Subversive Organization Will Not Preclude Defense Facility Employment

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and further extends the time that the distributees are kept from possession and enjoyment of their property.

The goal of probate procedures should be to assist rather than to impede the transfer of property from the dead to the living.[32] The *Smith* decision, however, conflicts with this basic social policy. It creates a "probate deep freeze" by tying up estate assets for extended periods of time, while the courts' "archaic probate machinery" cranks through its process.[33] Significantly, the decision comes at a time when progressive jurisdictions throughout the country are striving to reduce the workload of courts and make probate procedures simpler and less expensive.

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CONSTITUTIONAL LAW: MERE MEMBERSHIP IN A SUBVERSIVE ORGANIZATION WILL NOT PRECLUDE DEFENSE FACILITY EMPLOYMENT

United States v. Robel, 88 S. Ct. 419 (1967)

Appellee had been employed as a machinist by the Todd Shipyard Corporation for ten years before it was designated a "defense facility" by the Secretary of Defense in August 1962. As a member of the Communist Party, he was charged with violating section 5 (a) (1) (D) of the Subversive Activities Control Act of 1950. This statute provides that it is unlawful for any member of an organization under final order to register as a Communist-action group with the Subversive Activities Control Board "to engage in any employment in any defense facility."[1] The federal district court dismissed the indictment for failure to allege "active" membership and "specific intent" to advance the organization's unlawful purposes.[2] On direct appeal, the United States Supreme Court HELD, section 5 (a) (1) (D) is unconstitutional because it bars defense facility employment solely through guilt by association without a showing that the *individual* poses a threat to the national security.

32. SIMES, *Introduction to* SIMES, MODEL PROBATE CODE at 9 (1946); Wellman, *Uniform Probate Code,* 12 L. QUADRANGLE NOTES 4 (1967).

33. Wellman, *supra* note 32, at 6.

1. 50 U.S.C. §784 (a) (1) (D) (1950).

2. United States v. Robel, 254 F. Supp. 291 (W.D. Wash. 1965).

The Court has recognized that the right of association is a necessary consequence of the first amendment guarantees of freedom of speech and assembly.[3] The right exists without regard to whether the association seeks to advance political, economic, religious, or cultural beliefs.[4] Courts have been reluctant to abridge freedom of association, with certain exceptions relating to subversive organizations. Two rationales have been utilized to implement this policy. First, the test that balances the particular governmental interest in regulation of associational relationships with the individual freedoms of the first amendment[5] will weigh in favor of the individual unless his association presents a "grave and immediate danger"[6] or, more popularly, a "clear and present danger."[7] Second, courts have frequently resorted to strict statutory construction to invalidate overly broad statutes. As stated in *Shelton v. Tucker*:[8] "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[9]

While protection of associational freedoms is predominant today, the United States has never acknowledged a "fundamental right of subversive association."[10] In contrast to its watchful and inflexible attitude toward legislation infringing on associational freedoms in other areas, the Court has been very resourceful in upholding legislation involving membership in subversive organizations.[11] *Scales v. United States*[12] is a classic example of this resourcefulness. There the Court read into the Smith Act membership clause[13] requirements that "active" membership and "specific intent" to advance the organization's unlawful purposes be shown before a conviction could stand. The act itself was silent on these matters.[14] The unifying rationale for this and other major cases[15] involving the conflict of first amendment freedoms with national security was simply that the national interest as then interpreted was found paramount.

This history of tolerance toward legislation infringing on associational rights of members of subversive organizations has recently been altered by two related decisions, the present case being the most recent. The first case is

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3. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 543 (1963).
4. NAACP v. Alabama, 357 U.S. 449, 461 (1958).
5. Note, *The Right of Association and Subversive Organizations: in Quest of a Concept*, 11 VILL. L. REV. 771, 781 (1966).
6. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
7. Thomas v. Collins, 323 U.S. 516, 531 (1945).
8. 364 U.S. 479 (1960).
9. *Id.* at 488.
10. Rice, *The Constitutional Right of Association*, 16 HASTINGS L.J. 491, 503 (1966).
11. Note, *The Right of Association and Subversive Organizations: in Quest of a Concept*, 11 VILL. L. REV. 771, 789 (1966).
12. 367 U.S. 203 (1961).
13. 18 U.S.C. §2385 (1948).
14. 18 U.S.C. §2385 (1948); 367 U.S. 203, 221-22 (1961).
15. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950).

Aptheker v. Secretary of State,[16] which declared unconstitutional section 6 of the Subversive Activities Control Act of 1950. This section disallowed use of a passport by any Communist organization member having knowledge that the organization was under a final order to register.[17] The Court refused to imply limitations on the act in order to save it from constitutional invalidity. Because of the clarity and precision of the section, to do so would have required substantial judicial rewriting, which would have perverted the original legislative purpose.[18] The flaw in section 6 was its application to all Communists regardless of the threat posed to the Government by the individual Communist. The nature of the individual's membership in the organization was not considered. This arrangement is patently illogical in that persons were being denied their right to travel solely because of their associational ties and without specific proof that they threatened the nation.

Because *Aptheker* could have been based solely on first amendment grounds, it has been maintained that the decision may have pronounced a new rule of "due process" under the fifth amendment. This rule would permit legislatures in dealing with a personal liberty under the fifth amendment only that small amount of latitude allowed them in dealing with first amendment freedoms. This is distinctly less latitude than that allowed in legislation involving a deprivation of property under the fifth amendment.[19] If this hypothesis is correct, then in the present case the decision may have been based on the fifth amendment right to hold specific private employment.[20] In fact it was not, but rather was based squarely on the concept of freedom of association.

The instant case will now be examined in light of this new tendency to extend more associational rights to subversive organizations through refusal to inject constitutional limitations into otherwise overly broad legislation. The flaw in section 5 (a) (1) (D) was its indiscriminate inclusion of all members of the Communist Party regardless of such considerations as "active" membership or "specific intent," which were deemed so essential in *Scales*. As in *Aptheker*, and for the same reasons, the majority was unwilling to read these limitations into the section. Because of the lack of these limitations, the section established guilt by association alone, without proof or evidence that the individual's association posed the threat feared by the Government. By reason of the inclusion of all types of association with Communist-action groups without regard to the quality and nature of membership, section 5 (a) (1) (D) abridged rights guaranteed by the first amendment. The dissent maintained that the majority merely disagreed with Congress and the Defense Department when it ruled that Robel does not present a danger to the national security sufficient to require him to choose between his party mem-

16. 378 U.S. 500 (1964).

17. 50 U.S.C. §785 (1950).

18. 378 U.S. 500, 515 (1964).

19. Note, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 179, 195, 197 (1964).

20. Green v. McElroy, 360 U.S. 474, 492 (1959) *citing* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Peters v. Hobby, 349 U.S. 331, 352 (1955); Dent v. State of West Va., 129 U.S. 114 (1889).

bership and his defense facility employment.[21] Although there was some infringement on associational freedoms by the section, the dissent felt this was easily outweighed by the real and substantial national interest involved.[22]

The present case represents an inclination to extend more rights of association to unpopular political organizations because the contrary *Scales* rationale could have been used here had the court so chosen. Many fear that the nation's defense plants will now be infiltrated with Communist saboteurs who will greatly endanger the national security. Well aware of this possible misunderstanding, the majority opinion cautioned that nothing in the decision should be taken to mean the Government could not, through *narrowly drawn legislation,* keep from sensitive positions in defense facilities those who would use their posts to impede the progress of the nation's production.[23] Already, the internal security subcommittee of the Senate Judiciary Committee has made recommendations to fill the gap left by the instant decision. In direct response to the ruling by the Court in this case, the committee submitted a bill that would make it unlawful for an *active* member of an ogranization ordered to register with the Subversive Activities Control Board to be employed in a defense facility. To come within the act's scope, he must also have "subscribed or assented to any unlawful objective of such organization."[24] It is probable that this new bill, if passed, would survive judicial scrutiny as it contains the talismanic incantations of "active" membership and "specific intent." It will be recalled that these same limitations were found necessary in the *Scales* decision and were discussed in the instant case at the lower court level. The Court has announced a policy that requires the Government to prove that the *individual* is a security risk regardless of, and apart from, any association with a Communist-action organization. The proposed legislation apparently meets this requirement.

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21. 88 S. Ct. 419, 435 (1967).
22. *Id.* at 435-36.
23. *Id.* at 425.
24. S. 2988, 90th Cong., 2d Sess. §204 (B) (1968).